

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

JERI F. LEWIS,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER

PH-0752-98-0127-I-1

DATE: DEC 31 1998

Jeri F. Lewis, Philadelphia, Pennsylvania, pro se.

Joan Stanton, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of an initial decision that sustained the agency's action removing her from her position. We DENY the appellant's petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. For the reasons discussed below, however, we REOPEN this case on our own motion under 5 C.F.R. § 1201.117, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and SUSTAIN the appellant's removal.

BACKGROUND

- ¶2 The appellant was removed from her position as Certified Respiratory Therapy Technician, GS-07, at the Philadelphia Veterans Administration Medical Center based on the charges of disrespectful conduct and deliberate failure or unreasonable delay in carrying out instructions. Initial Appeal File (IAF), Tabs 4S and 4U. After receiving equal employment opportunity (EEO) counseling, she filed a timely formal EEO complaint with the agency alleging that her termination was the result of racial discrimination and in reprisal for filing a prior EEO complaint against her supervisor. IAF, Tab 5, Subtab A-2a. The agency conducted an EEO investigation and issued a decision finding that no discrimination or reprisal had occurred. IAF, Tab 4Y.
- ¶3 The appellant timely appealed her removal claiming that it was based on age, disability, and race discrimination and that it was taken in reprisal for her prior EEO complaint. IAF, Tab 1. After finding that a nexus existed between the appellant's misconduct and the efficiency of the service, and that the penalty was within tolerable limits, the administrative judge affirmed the agency action. Initial Decision (ID) at 14-17. She found that the agency had sustained the specifications in the charge of disrespectful conduct by a preponderance of the evidence. ID at 4. With respect to the charge of deliberate failure or unreasonable delay in carrying out instructions, she found that the agency had sustained it based on one of two specifications. ID at 6-7.
- ¶4 Regarding the appellant's affirmative defenses, the administrative judge found that the appellant had failed to establish a prima facie case of: (1) age discrimination because she was only 35 years of age; (2) disability discrimination because no medical evidence had been submitted to support her claim that she was disabled by her obesity; and (3) race discrimination because she had failed to show disparate treatment of similarly situated employees who were not in her protected class. ID at 7-12. She also found that the appellant failed to establish a

prima facie case of retaliation for having filed an earlier EEO complaint because there was an insufficient nexus between it and the disciplinary action. ID at 14.

¶5 The appellant filed a timely petition for review challenging the administrative judge's finding that the removal promoted the efficiency of the service. Petition for Review File (PFRF), Tab 1. In response, the agency asserts that the appellant's petition does not meet the criteria set forth at 5 C.F.R. § 1201.115. PFRF, Tab 3.

ANALYSIS

¶6 The administrative judge properly found that the appellant's misconduct of interrupting her supervisor's meeting with a non-agency sales representative at least twice, yelling at her supervisor in the presence of co-workers, and advancing towards her menacingly constituted disrespectful conduct. ID at 3-5. After a thorough review of the record, we discern no reason to disturb the administrative judge's findings that the agency sustained the charge of disrespectful conduct by preponderant evidence and that the appellant failed to prove her affirmative defenses. Because we find that the removal is reasonable based on the sustained charge of disrespectful conduct, we do not need to determine whether the second charge, deliberate failure or unreasonable delay in carrying out instructions, was sustained. Thus, for the reasons discussed below, further adjudication of this case is unnecessary.

¶7 Where all of the charges against the appellant are sustained, we will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). In those in which all of the charges have not been sustained, the Board will independently and responsibly balance the relevant *Douglas* factors to determine a reasonable penalty. *White v. U.S. Postal Service*, 71 M.S.P.R. 521, 527 (1996). Assuming arguendo here that only charge one were sustained, even if we therefore

apply this independent balancing, we would conclude that removal remains a reasonable penalty. The appellant's disrespectful conduct towards her supervisor in the presence of co-workers and a business invitee was serious in nature. *See Roberson v. Veterans Administration*, 27 M.S.P.R. 489, 494 (1985) (abusive language and disrespectful behavior are not acceptable conduct and are not conducive to a stable work atmosphere).

¶8 Indeed, the Board has found that insolent disrespect towards supervisors so seriously undermines the capacity of management to maintain employee efficiency and discipline that no agency should be expected to exercise forbearance for such conduct more than once. *See Jefferson v. Veterans Administration*, 6 M.S.P.R. 348, 352 (1981) (penalty of removal was appropriate and reasonable based on two specifications of disrespectful conduct toward supervisors). The record reflects that the appellant was previously disciplined for similar misconduct (*i.e.*, making threatening remarks to her supervisor and toward the medical center) and, that, as part of a grievance arbitration, she received an 18-month suspension.¹ IAF, Tabs 4B and 12. Moreover, when the arbitrator mitigated the penalty for the prior misconduct, he specified that "[t]he lesson she should learn if she is to be rehabilitated by this major suspension is that if she is to maintain a successful working relationship at the VA Medical Center or any other place of business then she much [sic] make changes in her argumentative and sometimes belligerent behaviors and in the way she handles stress on the job." IAF, Tab 12 at 16. Unfortunately, the appellant was not rehabilitated because the sustained misconduct occurred only two years after her suspension.

¹ Although the arbitrator concluded that there was insufficient evidence to support the threat charge, he found that there was sufficient evidence to support a finding that the "belligerent behaviors exhibited [by the appellant] . . . constituted just and sufficient cause for progressive discipline under offense 16 'Disrespectful conduct, using insulting, abusive, or obscene language to or about other personnel.'" IAF, Tab 12 at page 15-16.

¶9 Although the record does not suggest that the appellant's performance was unsatisfactory, it shows that she had worked for the agency for six years. The deciding official testified that he considered various alternative sanctions in this case, but because of the appellant's lack of remorse, the seriousness of the misconduct, her length of service, and her prior disciplinary record, he decided that removal was appropriate. Hearing Tape 3, Side 2. Furthermore, the agency's table of penalties recommends removal as the maximum penalty for a second offense of disrespectful conduct. IAF, Tab 4C.

¶10 As for mitigating factors, the administrative judge noted that the appellant's altercation with her supervisor was regarding why she had been assigned to replenish the 35-pound oxygen tanks, which was a source of distress to the entire staff of respiratory therapists because some therapists, including the appellant, had injured themselves in the past while moving the tanks. ID at 16. The administrative judge also noted that both Ms. Britt and the appellant testified that the medical center was short staffed on the day of the incident, which contributed to the stressful situation. *Id.* Notwithstanding these mitigating factors, given the seriousness of the sustained charge of disrespectful conduct, the severity of the appellant's prior disciplinary record, and her lack of rehabilitation potential, we find that removal is within the bounds of reasonableness. *See Douglas*, at 305.

¶11 Accordingly, the agency removal action is SUSTAINED.

ORDER

¶12 This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal

if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.